Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

KREIG PROSPER,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether Petitioner Was Denied A Fair Trial Because The United States Adduced Irrelevant and Inflammatory Evidence Categorically Describing The Type of "Take-Over" Robberies At Issue As The Most Serious?
2. Whether Categorized Evidence Concerning A Type Of Conduct Is Inadmissible Absent A Statutory Requirement That The United States Adduce Such Proof?
3. Whether It Is Presumptively Prejudicial To Admit Evidence Of Unexplained Wealth Without A Corresponding Explicatory Jury Instruction?
4. Whether The Sixty-Six Year Sentence Of Imprisonment Imposed On Petitioner Is Violative Of The Principle Of Proportionality?
5. Whether The Sentencing Scheme Set Forth In **18 U.S.C.A.§924(c)** As Applied Is Violative Of The Eighth Amendment?

List of Parties

All parties appear in the caption of the cover page.

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Opinions Below

The Opinion of the Third Circuit affirming the convictions is appended to this Petition as Appendix A. The Opinion is unpublished.

Jurisdiction

The jurisdiction of the Supreme Court to review the final judgment of the Third Circuit is based on **28 U.S.C.A. §1254(1).**

Constitutional, Statutory Rule Provisions Involved

Petitioner seeks review of issues of law arising under the Eighth Amendment to the United States Constitution and **18 U.S.C.A. §924(c).**

i.
The Eighth Amendment

The Eighth states that "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

ii.
18 U.S.C.A.§924(c)

18 U.S.C.A.§924(c) states:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that

provides for an enhanced punishment if committed by the use of a deadly dangerous weapon or device) for which the person may be prosecuted in a court of the United States uses or carries a firearm, or who, in furtherance of any such crime, possess a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of no less than 5 years;

(ii) if the firearm is brandished, be sentence to a term of imprisonment of not less than 7 years and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short barreled sho gun, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device or equipped with a firearm silencer or firearm muffler the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped

with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substance Act (21 U.S.C.801et seq.), the Controlled Substances Import and Export Act (21 U.S.C.951 et eq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to

display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

i. if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any terms of years for life; and

ii. if the killing is manslaughter (as defined in section 1112), be

punished as provided in section 1112.

Statement of the Case

I. Procedural History

District of New Jersey Indictment No. 06-309(1)(SRC) charged Petitioner Kreig Prosper with: conspiring to commit robbery in violation of 18 U.S.C.A. § 1951 (Counts One); bank robbery in violation of 18 U.S.C.A. § 2113(a) (Counts Two, Four, and Six), and using and/or carrying a firearm in relation to a crime of violence in violation of 18 U.S.C.A. § 924 (c) (Counts Three, Five and Seven). Petitioner entered a plea of not guilty to each of the offenses in the indictment. Trial commenced before the Honorable Stanley R. Chesler, U.S.D.J., and a jury. The jury convicted petitioner of each of the offenses set forth in the indictment. The district court thereafter imposed a sentence of 794 months imprisonment on petitioner.

Final judgment was entered on February 26, 2008. (Notice of Appeal was timely filed on March 3, 2008. On March 28, 2010 the Third Circuit affirmed. (Exhibit A).

II. Factual Background

A. The United States' Proofs

1. Testimony of Darnell Turner

i. Background

Turner stated that he, petitioner and co-defendant Shenez Lawrence committed an armed

robbery of a Sun National Bank in Matawan, New Jersey on January 12, 2005; a Sun National Bank in Holmdel, New Jersey on August 9, 2005, and a Sovereign National Bank in Woodbridge, New Jersey on December 9, 2005. In return for his plea and testimony, Turner's expectation was that any sentence imposed on him by the district court would not exceed 17 years imprisonment. [1]

ii. The Robberies

a. January 12, 2005 (Sun Bank Matawan)

Lawrence contacted Turner on the morning of January 12, 2005. Turner anticipated that Lawrence would tender an offer relative to his participation in a robbery. Turner was advised of the specific details of the contemplated robbery during a meeting at Lawrence's Keyport residence, in which petitioner allegedly joined. Turner was assigned and agreed to the role of getaway driver. The implements to be utilized by the robbers included "blue [Dickies] suits and walkie talkies."

After their arrival in the vicinity of the bank, Turner received precise instructions from Lawrence relative to his responsibilities. Turner was instructed to "drop off" Lawrence and petitioner in front of the bank. Thereafter, Turner was to wait until the time at which Lawrence and petitioner exited to flee. So too, the plan was that

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[1] Turner utilized the nickname "Chub" for petitioner and "Butch" for Lawrence. The parties stipulated as to the amount of money stolen in each of the robberies. Moe particularly, $239,194.00 was taken from Sun National in Matawan; $37,000.00 from the Sun National Bank in Holmdel, and $278,442.50 from the Sovereign Bank in Woodbridge.

"[Lawrence] go in the vault and [petitioner] stay at the teller desk." Turner was told to keep "[his] eyes open for the cops, give [Lawrence and petitioner] a minute and a half...[and contact them] on the [walkie-talkie]." At that point, Lawrence and petitioner would immediately exit the bank.

Turner testified that Lawrence and petitioner "then...suited up in all blue [Dickies] suits." Lawrence and petitioner also donned "ski goggles, masks [and] gloves." According to Turner, Lawrence and petitioner also possessed a .38 caliber revolver handgun and a .380 automatic. Lawrence and petitioner exited the vehicle as planned and entered the bank. Turner parked the getaway vehicle at the rear of the building. He counted seconds for 1 and 1/2 minutes. Turner thereafter alerted Lawrence and petitioner on the walkie talkie with the exclamation "Time's up." Turner subsequently returned to the front of the bank and an uncomplicated flight from the scene was accomplished.

b. August 9, 2005 (Sun Bank Holmdel)

Lawrence contacted Turner on August 8, 2005 regarding a second bank robbery. The prepatory meeting was allegedly attended by Lawrence, Turner and petitioner. An agreement was achieved relative to commission of a robbery in Holmdel on the following day. The group met as planned the following day. Turner was advised that a rented Chrysler Pacifica would be used as the getaway vehicle.

In preparation for the robbery, petitioner allegedly placed a fictitious license plate on the vehicle. He and Lawrence also "suited up" in the

Dickies outfits. As he dressed, Lawrence experienced discomfort in his abdominal area "because he got shot" there prior to August 9. Lawrence and petitioner adorned the same "ski goggles, ski masks, gloves [and] walkie talkies" utilized during the first robbery. In addition, Lawrence also possessed a .380 caliber firearm. The ***modus operandi*** to be applied in the August 9 effort was identical to that of January 12. Turner stated:

> I pulled up to the bank. They jumped out and went inside...I was driving and counting in my head...telling them...what time to come out...I said, 'Time's up'...They came right out.

c. December 9, 2005 (Sovereign Bank Woodbridge)

On December 8, 2005 Lawrence informed Turner of his intent to organize a third robbery on the following day. Turner, Lawrence and petitioner allegedly met as scheduled and effected rental of a 2006 Ford Expedition from "U Save Auto Rental." Turner testified that petitioner "took two [music] CDs from [Turner's] car" into the rented Expedition. Turner returned to Lawrence's apartment on December 9, 2005, at approximately 9:00 a.m. Petitioner arrived shortly thereafter. Petitioner was allegedly operating the Ford Expedition. Turner testified that he (petitioner) affixed a fictitious New York license plate onto the vehicle. Lawrence also possessed "a gray scanner, [which is] something like a cop radio [or] a cop walkie talkie but a

bigger version [with] a big antenna on it." Turner described Lawrence as "kind of wobbly...[because he] got shot in the head a couple of months [prior to December 8]."

After their arrival at the bank, Lawrence stated to petitioner and Turner that "he [could not] go in [the bank] because his leg [was] numb and he [didn't] want to fall over." For this reason, Lawrence asked Turner to enter the bank in his stead. Lawrence would replace Turner in the role of getaway driver. Turner agreed to this modification in their respective roles. Turner and petitioner entered the bank's premises to perpetrate the robbery.

2. The Arrest of Petitioner And Proofs

i. Steven F. Killane

Killane is employed by the City of Perth Amboy police department. On December 9, 2005 he was dispatched to the residence of Lawrence. Killane "went there to investigate the report of a shot that was fired." Killane advised Lawrence of his **Miranda** rights. Lawrence improvidently waived those rights. Thereafter, Lawrence informed Killane that "the lease [to the apartment] was in the name of Darnell Turner."

Killane subsequently "used the telephone of Lawrence and [he] called Darnell Turner." He also requested Lawrence's "consent to search the residence." Lawrence provided his assent to Killane to conduct the search. A search produced evidence inculpatory of Lawrence. Killane testified:

> I found a quantity of numbered fresh hundred dollar bills on top of the large dresser in front of the master bedroom...and several loose bills...[and] a large number of wrapped and unwrapped stacked dollar bills in a lower dresser drawer of a smaller dresser in that bedroom.

Killane also found "a backpack containing a number of wrapped coins in the middle bedroom." A pillowcase found in the residence contained "a large number of money wrappers." One of the wrappers was stamped "Sovereign Bank." Killane forthwith notified headquarters "because [he] was told earlier in the day of a bank robbery that occurred."

Turner subsequently arrived at the apartment. Killane stated that "Turner was [immediately] asked if he would come to police headquarters and he agreed." Lawrence and Sherrie Davis were also taken into custody. Davis is Lawrence's girlfriend.[2] Killane conducted an interrogation of Lawrence. Killane inquired as to the manner of Lawrence's acquisition of the currency seized during the search of his residence.

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[2] Sherrie Davis testified at trial. She stated that Lawrence and petitioner are cousins. Davis' knowledge stemmed from her cohabitation with Lawrence. As she, Turner and Lawrence were being escorted from the apartment, Lawrence "told [her] to take the money out of the house." Davis testified that she observed petitioner and Lawrence together "maybe once or twice a week." She stated "they just be hanging out." Davis claimed that at the police station she urged Lawrence "to be honest."

Lawrence allegedly stated to Killane "that he got the money from the [Sovereign Bank] job." Lawrence also admitted complicity in the Matawan incident. However, Lawrence denied being present in Holmdel, asserting that he was hospitalized.

ii. R.J. Gallagher

a. The FBI Investigation

Gallagher is employed by the Federal Bureau of Investigation as a special agent. On December 9, 2005 Gallagher was informed that "a robbery had just occurred at the Sovereign Bank which fit the **[modus operandi]** and description of other robberies [which he] had been [investigating]"[3] In this context, at approximately 11:40 p.m. on that night, Gallagher participated in the search of Lawrence's apartment.

During the search, Gallagher found "money in bags within the residence." [4] Gallagher also

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[3] Gallagher described the three robberies in question as "take-over bank robberies." He testified over objection that "take-over robberies are the most serious type of bank robbery." Stacey Stone, an employee of the Matawan Sun Bank on the day of the incident, testified that she terminated her employment because "we were robbed and I didn't feel comfortable working there anymore." Stone further testified that on the date of the robbery she "was six and a half months pregnant."

[4] A second search of the residence was conducted in May of 2006. Gallagher had monitored Lawrence's telephone conversations with Davis while he was incarcerated. This subsequent search was the product of information generated from the intercepted telephonic communications. Davis was asked by Lawrence to return to the apartment. She was specifically instructed to "look behind the [garage] wall." Gallagher stated:

seized Lawrence's telephone. Gallagher thereafter issued a subpoena to Sprint Nextel for production of "call detail records for that specific phone number." Gallagher then pursued records relative to numbers contacted by Lawrence's phone. This effort resulted in identification of a telephone subscribed to Patrocina Perreira, petitioner's friend.

b. Interview of Lawrence

Gallagher interrogated Lawrence at the Perth Amboy police headquarters on September 9. Gallagher testified that "eventually [Lawrence] just said, I did it, I did everything." As to the Matawan bank robbery, Lawrence "said he went inside." Lawrence admitted that he also participated in the second robbery. Lawrence further stated to Gallagher "that he did not go inside that time, that he had been shot and therefore was unable to do so." With regard to the third robbery of a Sovereign Bank in Holmdel, Lawrence confessed that he contacted Turner to plan it.

c. Search of Turner's Residence

On December 10, 2007 Gallagher received consent to search Turner's residence. The items found by Gallagher included "goggles that came from inside [a] Dunkin Donuts plastic bag." A black ski mask, gloves, walkie talkies and a police

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> We had listened to a phone conversation wherein it was described [that] something was hidden in a certain location or [he] was asking somebody to go retrieve something from the residence.

The second search yielded " a weapon that was recovered inside a closet behind some insulation."

scanner were also found within that bag.[5] Gallagher located a "bag with currency in it" in the attic. That bag contained a total of $40,487.00.[6] Turner also directed Gallagher to the area to which he removed other items of evidence.[7]

d. Identification of Getaway Vehicles

The Ford Expedition utilized in the December 9, 2005 robbery was recovered after the interview of Turner. The rental agreement bore Turner's name. Due to an informative description of the vehicle used in the January 12, 2005 robbery, Gallagher was able to locate the Chevy Trailblazer at issue therein. The vehicle was rented in petitioner's name. The Chrysler Pacifica utilized in the August 9. 2005 robbery was also leased from the Enterprise agency in Perth

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[5] The United States undertook a DNA analysis of the ski mask. With respect to DNA found thereon, the expert testified that "[the] major contributor's DNA typing matched that of [petitioner]." Nevertheless, the expert admitted that she "[could not] say that [petitioner] left that DNA." So too, she conceded the DNA found on the ski mask could be "from a person who had nothing to do with any bank robberies in this case."

[6] On December 22, 20005 Gallagher recovered an additional amount of currency. As was noted above, a neighbor of Turner, Malik Green, was acting as a bailee of it.

[7] Mark Alan Corrice is employed as a special agent of the FBI. Agent Gallagher instructed him "to go to the end of Colleen Street in Newark." He recovered a black garbage can from "a drainage basin." Colleen also "three metal money containers as well." Bryan Bodaj, a Sovereign Bank employee, identified the black garbage can as the "type of garbage can "[he] put money into" during the robbery. He also identified the coin trays.

Amboy. That vehicle, a Chrysler Pacifica, was determined to be traveling within 3 1/2 miles of the bank in Holmdel, in close temporal proximity to the robbery. Gallagher demonstrated this fact with EZ Pass records. The Chrysler Pacifica was rented in the name of Marvin Lambert.

e. Search of Petitioner's Apartment and Vehicle

The FBI conducted searches of a 1998 Buick Park Avenue motor vehicle registered in the name of Patrocina Periera and petitioner's residence. Keys to the motor vehicle were obtained from Chris Prosper, petitioner's brother. Several items were seized from within the motor vehicle, including: "a black Northface backpack" [8]; "a gray Air Jordan shoebox which contained [$28,000.00] in U.S. currency that was heat sealed in clear plastic"; "a black Air Jordan type shoebox that contained a loaded .38 revolver"; a Rhode Island license plate bearing the number JZ-175, and "a black Brinks lockbox."

A witness testified that $30,000.00 was located "inside the...lockbox wrapped in [a] clear plastic, [heat] sealed bag." The lockbox was found within the backpack. Several items were also seized from within the apartment which petitioner shared with Pereira.[9]. A witness described the items. She testified:

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[8] Personal documents bearing petitioner's name were found in the backpack. The backpack also contained "five individual squares with velcro on the back."

[9] Yunshen Lee owned the condominium leased to petitioner and Patrocina Pereira. Lee testified that petitioner "said that he was in some sort of construction work."

> [An] empty Air Jordan shoe box, a Radio Shack Manual for a Pro 97 1000 Channel hand-held scanner, a police call frequency guide, a CD rom that was labeled police calls, some Thrifty Car Rental paperwork, some bank related paperwork, as well as a heat sealer.[10]

f. Unexplained Wealth

The United States adduced proofs of alleged monetary expenditures of petitioner in and around the time-frame associated with the robberies. These expenditures included: purchase of and restorations on a 1998 Buick Park Avenue motor vehicle[11]; jewelry; auto repairs; a hotel receipt, and purchase of a Mercedes Benz.[12] The United States also produced evidence of an account in petitioner's name at Quick and Reilly. The annual income declaration listed relative to the account is $8,000.00.

iii. Fingerprint Evidence

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[10] The manual referred to the same model scanner as the one found in Turner's residence.

[11] Jennifer Viverito was employed at All American Chevrolet. She testified as to a sale of the 1998 Buick Park Avenue to petitioner and Patrocina Pereira. The purchase occurred on January 15, 2005. Viverito remembered the transaction because it "was the only cash sale that [she] had while working at All American Chevrolet...[for] ten months." Viverito testified that petitioner and Pereira stated that "[they] gambled...[and] won the money." The receipt produced by Viverito indicated that $5,880.00 was tendered in cash.

[12] The certificate of title indicated that Chris Prosper owned the Mercedes.

Alison Larson is employed by the FBI as "a physical scientist forensic examiner in the latent print operations unit." Her specific function is to "process items of evidence for the presence or development of latent prints." Larson "compares those latent prints with known prints that are either submitted by the contributing agency or obtained from the FBI fingerprint database." Larson developed 17 latent fingerprints from items provided to her. She testified that 12 of the fingerprints matched those of petitioner. Specifically, Larson testified to matching petitioner's prints with those found on a plastic bag previously found in a Brink's lock box; a heat sealer, and a CD.

On the basis of the foregoing evidence, petitioner was convicted of conspiracy to commit robbery; armed robbery, and using or carrying a firearm in relation to a violent offense. The Third Circuit affirmed. This Petition follows.

Reasons For Granting The Petition

Point I

The District Court Erred In Admitting Highly Prejudicial And Irrelevant Evidence Concerning The Violent Nature Of The Robberies

The United States elicited irrelevant and inflammatory evidence, characterizing the robberies to the jury as particularly heinous and violent. Such evidence was neither germane nor pertinent to any fact at issue in the trial. So too, it

did not relate to any element of the offenses charged in the indictment. The singular purpose was to deflect the jury's attention from the paucity of evidence indicating that petitioner participated in the robberies. The jury's consideration of this irrelevant evidence in its deliberations denied petitioner due process and a fair trial. This Court must grant certiorari and reverse the convictions. Fundamental fairness demands no less.

A. Factual Background

The district court correctly instructed the jury that the United States was not required to demonstrate extraordinarily violent behavior as an element of the three robbery counts. In its instructions to the jury, the district court stated:

> The government need not show [that] defendants' behavior was so violent that it was likely to cause terror, panic or hysteria. The essence of the element is the taking of property aided and accompanied by intentional intimidating conduct on the part of the defendants.

Notwithstanding the irrelevant nature of evidence tending to establish the conduct as terrorizing or hysteria-inducing, the district court permitted the United States to adduce it. Agent Gallagher was permitted to testify over objection that "take-over robberies are the most serious type of bank robbery." Similarly, Stacey Stone testified that she terminated her employment at the Matawan Bank because "we were robbed and I didn't feel comfortable working there anymore."

Stone also testified that she was pregnant at the time the robbery occurred.

B. Applicable Law

i. Evidence Rules

Fed.R.Evid.402 states that all relevant evidence is admissible. A corresponding rule, **Fed.R.Evid.401,** defines relevant evidence. That rule states:

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Despite the general proposition that all relevant evidence is admissible, circumstances may exist which warrant even the exclusion of clearly relevant evidence.

The several bases justifying exclusion of relevant evidence are set forth in **Fed.R.Evid.403**. The rule states:

> Although [it is] relevant, evidence may be excluded if its probative valve is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

In sum, all evidence having any tendency to make the existence of any fact that is of consequence more probable or less probable is admissible. See, **Fed.R.Evid. 401** and **402.** However, the evidence is excludable if its probative value is outweighed by the danger of prejudice or confusion. See, **Evid.R.403.**

ii. Case Law

Case law interpreting the confluence of the three above-quoted rules is abundant. In **United States v. Lawson, 494 F.3d 1046, 1052 (D.C.Cir.2007)**, the district court relied upon the configuration articulated by petitioner herein. To be admissible, evidence must be relevant, and its probative value must not be substantially outweighed by the danger of unfair prejudice or misleading the jury. **Id.** There is no provision in the rules or case law supporting admission of irrelevant evidence.

Moreover, we stress that this Court has recently iterated that the right to present even relevant evidence is not unlimited, but is subject to reasonable restrictions. **United States v. Scheffer, 523 U.S.303 (1998), remand 51 M.J. 132.** The Court in **Scheffer** stated:

> State and federal governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of [relevant but] unreliable evidence is a principal objective of many evidentiary rules. **[523 U.S. supra at 309]**.

See, **Holmes v, South Carolina, 547 U.S. 319 (2006).**

C. The Verdicts Must Be Reversed

The evidence of which petitioner complains was irrelevant and should not have been admitted. The district court's instructions to the jury specifically indicate that the evidence at issue does not relate to the elements of the offense of robbery. The testimony that "take-over robberies are the most serous type of robbery" was a blatant attempt by the United States to inflame and impassion the jury. And, the testimony that a bank employee was pregnant, and destabilized to the point of terminating her employment, exacerbated the prejudice.

The district court was required to exclude the evidence because it did not bear a logical relationship to an element of the offense or an affirmative defense. See, **United States v. Mayferrer, 514 F.3d, 1161 (11 Cir. 2008).** A party has no right to present evidence which does not incorporate within it the logical relationship identified by the **Mayferrer** Court. See, **United States v. Hurn, 368 F.2d 1359, 1365 (11 Cir. 2004).** The logical relationship may be direct or indirect but it must be established. **Id.** It cannot be gainsaid that the proper decision would have been to exclude the irrelevant and unnecessary evidence. We stress that the district court possessed wide discretion to exclude even relevant evidence which posed an undue risk of prejudice or confusion of the issues. **United States v. Han,**

230 F.3d 560, 584 (2 Cir. 2000); United States v. Maldonado-Garcia, 446 F.3d 227 (1 Cir. 2006).

To prove the intimidation element of robbery, the United States must merely establish that the defendant's conduct constitutes a threat. Conduct is deemed to be a threat if it was calculated to create the impression that any resistance would be met with physical force. **United States v. Smith, 131 F.3d 685, 688 (7 Cir. 1997).** The jury in this case was shown video-tapes of the robberies, which included the brandishing of weapons by the robbers. The video depictions of the robberies are a ***res ipsa loquitor*** demonstration that the purpose of the robbers was to create the impression that any resistance would be met by force. **United States v. Smith, supra.**

The irrelevant and inflammatory evidence adduced by the United States in the testimony of Gallagher was intended to substitute passion for actual evidence of petitioner's participation in the robberies. Stated somewhat differently, because the evidence as to petitioner's identity as a participant in the robbery was basically dependant exclusively on the testimony of Turner, the United States improperly resorted to evidence of terror and lingering hysteria to sway the jury. About this purpose, there can be no doubt.

Unlike Turner and co-defendant Lawrence, petitioner had not provided a confession to authorities and the evidence as to him was woefully thin. Indeed, the only evidence of an arguably inculpatory nature relative to petitioner consisted of fingerprints lifted from CDs and a

plastic bag. Neither of those items conclusively established that petitioner, in fact, participated in the robberies. And, the other physical evidence was found in a motor vehicle in the possession of petitioner's brother. The brother was not charged.

This Court must reverse the convictions achieved herein as to petitioner. The district court's decision to admit the clearly objectionable aspects of the testimony of Stone and Gallagher was fatally prejudicial. Further, we submit that the jury's improper consideration of the evidence rendered the trial a hollow mockery of justice. Moreover, it was sufficiently prejudicial to raise questions concerning the integrity of the verdicts.

Point II

The District Court Committed Plain Error And Subverted Due Process In Failing To Instruct The Jury As To Proper Consideration Of Evidence Adduced Concerning Petitioner's Alleged Unexplained Wealth

The United States was permitted at trial to adduce evidence of several monetary expenditures of petitioner related to identifiable material acquisitions. The underlying transactions at issue occurred in temporal proximity to the robberies charged in the indictment. The district court found that evidence of the so-called "unexplained wealth" associated with consummation of the purchases was probative of petitioner's guilt. However, the district court did not provide the jury with any guidance concerning properly circumscribed consideration of the evidence by it.

Simply put, the court did not issue any corresponding legal instructions.

The lack of a legal instruction is particularly significant herein. The expenditures included acquisitions of motor vehicles registered in the names of others, and allegedly concomitant false statements concerning the source of the funds. The false statements were supposedly uttered at the time of purchases. Specifically, the United States adduced evidence that petitioner allegedly misadvised an automobile salesperson that the funds for the purchase were derived from gambling winnings. Similarly, a person who leased an apartment to petitioner was allegedly misinformed that petitioner "said that he was in some sort of construction work."

We submit that the district court's failure to issue the required legal instructions denied petitioner due process and a fair trial. Such instructions were necessary to guide jurors in their consideration of the evidence in question. Contrary to the admissible purpose of such evidence, the jury was free to utilize it as proof of bad character and/or a disposition to procure assets by fraud and stealth. Succinctly stated, a jury instruction was clearly required to make certain that admission of the evidence did not result in an irreparable and fatal misapprehension of the distinction between evidence of guilt and a disposition to commit crime.

i. Admissibility of Unexplained Wealth

The general rule is that the sudden unexplained acquisition of wealth by an

impecunious person at or about the time of a theft, which he had an opportunity to commit, is competent evidence of guilt. **United States v. McKenzie, 414 F.2d 8808, 8809 (3 Cir. 1969).** In **United States v. Bamberger, 456 F.2d 1119, 1131 (3 Cir. 1972),** the Third Circuit refused to consider a challenge to the instructions related to such evidence because it was raised for the first time on appeal. However, the Court in **Bamberger** appeared to state ***in dicta*** that an instruction concerning proper consideration of the evidence is required, if timely requested. The **Bamberger** Court stated:

> We do not reach the merits of the foundation issue...[because] no timely objections [were] lodged to [the] jury instructions...We hold that under the instant circumstances, where no instruction was requested or given as to the relevancy...it was not clear error...to receive this evidence. **[456 F.2d supra at 1131-1132].**

See, **United States. V. Colkley, 899 F.2d 297, 303 (4 Cir. 1990); United States v. Pensinger, 549 F.2d 1150, 152 (8 Cir. 1977).**

ii. The Convictions Must Be Reversed

The complexity of the issue in the case at bar is derived from the fact that the transactions at issue had independent aspects of alleged illegality, ***viz.*** registrations of vehicles in others' names or allegedly false statements concerning the source of funds. For this reason, the district

court could not consider the evidence as simply being "unexplained wealth." The nature of the alleged transactions implicated the category of evidence denominated "other crimes." **Fed. F. Evid. 404 (b).** Clearly, there was a real danger that a jury would infer bad character and/or a disposition to commit crime from the transactions, as opposed to considering the evidence merely as competent proof of guilt.

In **United States v. Brown, 327 F.3d 867 (9 Cir. 2003)**, the prosecutor stated in closing argument that "if a man is willing to cheat a little bit over here, wouldn't he be willing to cheat just a little bit over there." The prosecutor's statement in summation in **Brown** was based on "other acts." The Court in **Brown** recognized the capacity of the statement to show propensity, requiring that a curative instruction be provided by the district court. The purpose of such a curative instruction was to advise the jury to reject implication of a propensity to cheat and limit consideration of the other acts evidence only to prove intent. See, **United States v. Brand, 467 F.3d 179 (2 Cir. 2006)** (A distinction exists if other acts are adduced to rebut defense of entrapment).

It cannot be gainsaid that the law in all federal courts is that a jury must always be instructed to consider any "other acts" evidence only for the limited purpose for which it is admitted. See, **United States v. Daraio, 445 F.3d 253 (3 Cir. 2006), cert. den. 127 S. Ct. 932 (2007); United States v. Cruz, 326 F.3d 392 (3 Cir. 2003); United States v. Vega, 285 F.3d 26 (3 Cir. 2002); United States v. Butch, 256 F.3d**

117 (3. Cir. 2001); United States v. Davis, 183 F.3d 231 (3 Cir. 1999). It is undeniable that the so-called "unexplained wealth" in the instant matter was fraught with a potential for the jury to find bad character and/or a disposition to commit crime in the absence of the proper instruction.

This Court has no just option other than to reverse the convictions herein. Evidence admitted by the district court permitted the jury to convict petitioner on the basis of bad character or a disposition to commit crime. This occurred because no legal instructions to the contrary were presented to the jury. The district court's failure in this regard constituted plain error and was clearly capable of producing an unjust result. All of the evidence adduced as to petitioner was either circumstantial or the product of a self-serving statement of an alleged co-conspirator. Absent the error, petitioner might well have been acquitted. The verdicts are an unreliable and untrustworthy indication of whether the result is based upon evidence as opposed to a mistake. See, **United States v. Tobin, 155 F.3d 636 (3 Cir. 1998), cert. den. 119 S.Ct. 1094 (1999); United States v. Dickens, 695 F.2d 765 (3 Cir. 1982), cert. den. Conerly v. United States, 103 S.Ct. 1792 (1983).**

Point III

The District Court Abused Its Discretion And Imposed An Unreasonable Sentence Which Concomitantly Constituted A

Constitutionally Prohibited Disproportionate Penalty

Petitioner is a youthful offender who was previously convicted of two marijuana-related offenses in Rhode Island state court. The two offenses occurred in close temporal proximity to one another (three months), and were sentenced on the same day. Petitioner received an aggregate sentence for the prior offenses of 90 days imprisonment, and a period of probation scheduled to expire on November 29, 2006. The instant offenses constitutes a violation of the probationary aspect of the state court sentence.

Notwithstanding the indisputably sparse nature of petitioner's prior criminal history, and the lack of venality associated with it, the district court determined that a fully custodial sentence of 794 months was reasonable under the circumstance. The sentence is predicated upon the structured prescriptions for violent gun offenses set forth in **18 U.S.C.A.§ 924 (c)**. The statute requires consecutive draconian punishments for multiple offenses, even where the adjudications occur in a single trial. More specifically, no consideration is given to the fact that no injuries were sustained by any party as a result of the conduct. And, there was no intervening opportunity for a sentence to be imposed on petitioner with a deterrent capacity relative to a subsequent offense.

The sentence imposed on petitioner calculates into in excess of sixty-six years of imprisonment. This period of exposure to incarceration exceeds that which is "reasonable"

as that principle of modern sentencing law is defined within case law and is clearly disproportionate. Accordingly, due process demands that it be reduced. See, **United States v. Cavera, 505 F.3d 216, 220 (2 Cir. 2007).** The sentence essentially requires that petitioner spend the balance of his life in prison.

i. United States v. Shoupe III

In **United States v. Shoupe III, 35 F.3d 835 (3 Cir. 1994)**, the Third Circuit first recognized the appropriateness of a downward departure in a case where the defendant's exposure to imprisonment over-represents his criminal history and likelihood of recidivism. **Shoupe III** related to the career offender Guideline, which is analogous to the structure of **18 U.S.C.A. § 924 (c).** In adopting this position, the **Shoupe III** Court stated:

> We join the other courts of appeals that have reviewed this issue and held that where a defendant's offense level has been augmented by the career offender provision, a sentencing court may depart downward in both the criminal history and offense level categories under **§ 4A1.3. [35 F.3d supra at 839].**

See, **United States v. Smith, 909 F.2d 1164 (8 Cir. 1990); United States v. Brown, 985 F.2d**

478 (9 Cir. 1993); **United States v. Hazel, 928 F.2d 420 (D.C. Cir. 1991).**

ii. Post-Booker Sentencing

Post-**Booker** all sentences are reviewed for reasonableness under an abuse of discretion standard. **Gall v. United States, __U.S.__, 128 S.Ct.586, 594, 169 L.Ed.2d 445 (2007).** Reasonableness includes a procedural component, which encompasses how the sentence was calculated, and a substantive component concerning the length of the sentence actually composed. **United States v. Sutton, 520 F.3d 1259, 1262 (10 Cir. 2008); United States v. Smart, 518 F.3d 800, 802-03 (10 Cir. 2008).** Procedural reasonableness addresses whether the district court correctly calculated the advisory guidelines range and whether the facts relied upon were adequately supported. **United States v. Sutton, supra at 1262; United States v. Duhon, 541 F.3d 391 (8 Cir. 2008).**

Where the district court correctly calculates the advisory Guidelines range based upon the facts and imposes a sentence within that range, the sentence is entitled to a presumption of reasonableness. **Rita v. United States, ___ U.S.___, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007).** In **Gall v. United States, supra,** this Court stated:

> As we explained in **Rita**, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range...As a matter of administration and to secure nationwide consistency, the

Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue whatever sentence they deem appropriate, the district judge should then consider all of the **§ 3553(a)** factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable...He must make an individualized assessment based, on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence

under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or properly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range. Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably

> have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court. **[128 S.Ct. supra at 597]**

iii. The Sentence Imposed Was Unreasonable

The Court in **Gall, supra**, basically stated that the reasonableness of a sentence is tethered to the analysis of the factors set forth **18 U.S.C.A.§ 3553(a)**. See, **United States v. Ameline, 400 F.3d 646, 650 (9 Cir. 2005).** An examination of those factors militates in favor of a finding that the district court abused its discretion in imposing in excess of a disproportionate 66 year sentence on petitioner. Accordingly, this Court must reverse. Our analysis of the factors is set forth seriatim herein.[13]

1. The Factors

a. Nature and Circumstances of the Offense (§ 3553(a)(1))

The essential nature and the circumstances of the offense can be synthesized by reference to petitioner's alleged participation in three armed robberies wherein no injuries occurred and no extraordinary or heinous threatening behavior is at issue. The significant aspect is that **18 U.S.C.A.§924 (c)** skewers the district court's

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[13] It is our view that **18 U.S.C.A.§ 924 (c)** is unconstitutional if it precludes a district court from fashioning a reasonable and proportionate sentencing. See, **Gall v. United States, supra.**

capacity to effect a reasonable sentence exclusively on the basis that firearms were brandished. See, **United States v. Smith, 505 f.3d 463, 470 (6 Cir. 2007)** (Modern-day sentencing should be guided by the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender).

b. History and Characteristics of Defendant (§ 3553(a)(1))

As is detailed in the PSR, petitioner has a history of achievement in education and is 10 credits short of earning an Associate's degree. Petitioner had a G.P.A. of 3.0. He has also maintained substantial gainful employment on an intermittent basis. Relative to prior criminal history, petitioner has two convictions for marijuana-related offenses in Rhode Island state court. Petitioner has a supportive and impressive mother. Moreover, he is engaged to betroth "a bright, mature young woman" named Patrocinia Pereira. Petitioner's stepfather died when he was young. Loss of his stepfather greatly affected petitioner and influenced negatively his growth and development. Petitioner never met his biological father. This fact exacerbated the impact of the step-father's passing in 1993.

c. Need for the Sentence § 3553(a)(1)(2)

The district court was required to impose a sentence on petitioner which reflects the duality of his young life, achievement in educational and vocational endeavors denigrated by alleged involvement in armed robberies. Stated somewhat differently, the sentence should focus on

rehabilitation and reformation in a manner which does not completely eliminate his future opportunities for re-entry into society and concomitant honest and remunerative industry. See, **United States v. Myers, 503 F.3d 676 (8 Cir.2007)** (Court imposed special conditions of supervised release to protect public from mentally ill defendant sentenced to a term 40 percent below guidelines).

Petitioner has not previously been exposed to a period of imprisonment which contraindicates positive adjustment if lenity is granted here. Subsequent to imprisonment for a period of much less than 66 years, followed by a period of transition, an accurate assessment of petitioner's long-term prognosis will be possible. In this regard, supervised release, after a lesser period of confinement, will ensure the system's ability to monitor: (1) the degree to which petitioner has regained the ability to be law-abiding; (2) is deterred from recidivism; (3) poses no danger to the public, and (4) has received effective reformative services.

Simply put, a sentence far less than 66 years is sufficient to comply with **§ 3553(a)(2); United States v. Ward, 506 F.3d 468 (6 Cir. 2007). In re Morgan, 506 F.3d 705 (9 Cir. 2007)** (Defendant has no right to a specific sentence only a reasonable one); **United States v. Tom, 504 F.3d 89 (1 Cir. 2007)** (Reasonableness of sentence depends on both plausible explanation and defensible overall result). The principle of rehabilitation in lieu of excessive imprisonment urged before this Court was actualized in **United States v. Hairston, 502 F.3d 378, 383 (6 Cir.**

2007). (The defendant therein received a 51 percent departure from a 120-month guideline range based on findings that the repeat offender's crime had been motivated by addiction rather than profit).

2. The Sentence Should Be Reversed

A significant but lesser period of incarceration should be imposed on petitioner. Had his step-father not died prematurely, petitioner's life may have stayed on a positive course. The **18 U.S.C.A. § 924 (c)** sentencing scheme should not be used in a manner which completely consumes his life with 66 years of imprisonment. Such a result would be a travesty and utter wreckage of a salvageable human being. This Court must so find.

iv. The Statute Imposes A Disproportionate Penalty

The sentence imposed by the trial court pursuant to **18 U.S.C.A.§924(c)** violated the principle of proportionality. The principle of proportionality is that punishment should not be by reason of its excessive length or severity, greatly disproportionate to the offense committed by the defendant. A sentence of 66 years imprisonment for the conduct at issue relative to petitioner is disproportionate to any harm attendant to it. A review of the facts makes this manifest. Specifically, there were no injuries and the three verdicts were returned in the same trial. Petitioner had no opportunity to be chastened by the sentence for a first offense prior to being subjected to a progressive sentence. Succinctly

stated, he did not have adequate notice of the potential consequences. See, **Weems v. United States, 217 U.S. 349 (1910); Solem v. Heim, 463 U.S. 277 (1983). Cf. United States v. Fischback and Moore, Inc., 750 F.2d 1183, 1192 (3 Cir. 1984).** Further, petitioner had no prior record of violent behavior.

The leading case with reference to disproportionality is **Solem v. Heim, supra.** The opinion of this Court therein is predicated upon a thorough analysis of the Eighth Amendment and its proscription against unfair sanctions. "The Eighth amendment declares...excessive fines [shall not be] imposed, nor cruel and unusual punishments inflicted". **Solem v. Heim, supra at 284.** This clause prohibits not only barbaric punishment, but also sentences that are disproportionate to the crime committed. **Id.** The **Solem** Court discussed the origin of the principle of proportionality and its inclusion into the Bill of Rights. The Court stated:

> [It is] a longstanding principle of English law that the punishment...should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged...when the Framers of the Eighth Amendment adopted the language of the English Bill of rights, they also adopted the English principle of proportionality. **[463 U.S. supra at 285].**

This Court first "endorsed the principle of proportionality as a constitutional standard" in

Weems v. United States supra. The **Weems** Court stated that it is a precept of justice that punishment for crime be graduated and proportioned to the offense." **217 U.S. supra at 367. Cf. O'Neil v. Vermont, 144 U.S. 323, 331 (1892); Trop v. Pulles, 356 U.S. 86, 111 (1958); Robinson v. California, 370 U.S. 660, 667 (1962); Enmund v. Florida, 458 U.S. 782 (1982); Coker v. Georgia, 433 U.S. 584, 601 (1977).**

The **Solem** Court identified objective factors by which courts are to be guided in reviewing claims of disproportionality. The **Solem** Court stated:

> First, we look to the gravity of the offense and harshness of the penalty...Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive...Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. **[463 U.S. supra at 290-291].**

The **Solem** Court recognized that "application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale." **463 U.S. supra at 292.** The Court in **Solem** provided an analytical

framework for comparative judgments. The Court stated:

> Comparison can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in **Enmund** the Court determined that the petitioner's conduct was not as serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence.
>
> . . .
>
> Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In **Enmund** the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices.
>
> . . .
>
> This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes. **[Id.]**

We are conscious of the Third Circuit's opinion in **United States v. Walker, 473 F.33d 71 (3 Cir. 2007)**, which analyzes petitioner's claim in a pre-**Gall** setting. The Court in **Walker** acknowledged that an extraordinary case can constitute a constitutional violation. **United States v. Walker, supra at 79; Lockyer v. Andrade, 538 U.S. 63, 72, 77 (2003).** In this context, petitioner has clearly demonstrated a gross imbalance between the crime and sentence. **United States v. Walker, supra at 82; United States v. MacEwan, 445 F.3d 237 (3 Cir. 2006).**

Had petitioner been previously convicted of violent offenses and admonished as to the consequences of reinvolvement, the considerations would be different. Petitioner allegedly participated in three armed robberies, each of which was joined in a single indictment. The resultant convictions were progressively sentenced because of **18 U.S.C.A.§ 924 (c)** to a period of imprisonment of 66 years. That is essentially a life sentence. See, **Mistretta v. United States, 488 U.S. 361, 390-91 (1989).** The sentence is plainly disproportionate and "cannot be consistent with due process without an individualized determination of whether his conduct and criminal history justify such a sentence." **United States v. Walker, supra at 70; Gall v. United States, ___ U.S. ___, 128 S.Ct. 586, 169 L.Ed. 2d. 445 (2007). Cf. Deal v. United States, 508 U.S.129, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993).**[14]

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[14] **Deal v. United States, supra**, upheld the **18 U.S.C.A.§ 924(c)** sentencing scheme. However, it too was pre-**Gall**.

Conclusion

For the foregoing reasons, we respectfully request that this Court grant certiorari, reverse the convictions and find that the 66 year sentence herein constitutes an abuse of the district court's discretion and/or violates the principle of proportionality. Due process demands no less.

Respectfully submitted,

Alan Dexter Bowman
Dated: June 21, 2010

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1663

UNITED STATES OF AMERICA

v.

KREIG PROSPER,
also known as CHUB

KREIG PROSPER,
Appellant

No. 08-1751

UNITED STATES OF AMERICA

v.

SHENEZ LAWRENCE a/k/a BUTCH
a/k/a RANDY LAWRENCE

SHENEZ LAWRENCE,
Appellant

On Appeal from the United States District Court

AP- 1

for the District of New Jersey
(D.C. Nos. 06-cr-00309-001 and 06-cr-00309-002)
District Judge: Honorable Stanley R. Chesler

Submitted Pursuant to Third Circuit LAR 34.1(a)
January 28, 2010

Before: FUENTES and FISHER, *Circuit Judges*,
and DIAMOND,* *District Judge*.
Filed: March 24, 2010

OPINION OF THE COURT

FISHER, *Circuit Judge*.

Shanez Lawrence and Kreig Prosper appeal their respective convictions and sentences for one count of conspiracy to commit bank robbery in violation of 18 U.S.c.§ 1951, three substantive counts of bank robbery in violation of 18 U.S.C. § 2113(a), and three counts of using or carrying a firearm during and in relation to a bank robbery in violation of 18 U.S.C. § 924(c). We will affirm.

I.

We write exclusively for the parties, who are familiar with the factual context and legal

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* Honorable Paul S. Diamond, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

history of this case. Therefore, we will set forth only those facts necessary to our analysis.[1]

Lawrence and Prosper, in conjunction with co-conspirator Darnell Turner, conducted three "takeover" bank robberies in 2005. The men fled the Sun National Bank in Matawan, New Jersey on January 12, 2005, with $239,194; the Sun National Bank in Holmdel, New Jersey on August 9, 2005, with $37,000; and the Sovereign Bank in Woodbridge, New Jersey on December 9, 2005, with $27,893.50. In each instance, the three men followed a substantially similar *modus operandi*.

In the first two robberies, Lawrence and Prosper entered the banks while armed, threatened the tellers and customers, and acquired cash. Turner served as the getaway vehicle driver and remained outside the bank watching for law enforcement. Lawrence and Prosper donned essentially the same outfits for both robberies, choosing to wear ski masks, gloves, and goggles. In the third robbery, Lawrence, due to injuries suffered from a gunshot wound, acted as the getaway driver while Turner and Prosper entered the bank to conduct the robbery.

Following the third robbery, police officer Steve Killane responded to reports of gun fire at Lawrence's home. Lawrence was arrested, waived his *Miranda* rights, and was questioned by police. Upon searching Lawrence's residence, police

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[1] The District Court exercised subject matter jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction over these consolidated appeals pursuant to 18 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

recovered, among other things, a significant amount of cash and coins as well as several empty money wrappers. Aware of the bank robbery on that day, the officers contacted the Federal Bureau of Investigation. In the meantime, Turner arrived at Lawrence's residence and police transported both men to the police station for questioning.

Upon questioning by authorities, Lawrence confessed and proceeded to discuss each robbery in detail. Turner also confessed to his anticipation in all three robberies; he identified Lawrence and Prosper as his co-conspirators and discussed each robbery in detail.

Following these confessions, authorities began surveillance of Prosper, who had gone on a spending spree following the first robbery, spending thousands of dollars on vehicles, jewelry, and a trip to Atlantic City. Upon searching Prosper's vehicle, authorities found tens of thousands of dollars and the .38 caliber handgun that Turner carried during the third robbery. Subsequent searches of each suspect's residence revealed additional currency, money wrappers, and other tools used during the robberies including goggles, ski masks, and gloves.

The grand jury returned a superseding nine-count indictment against Lawrence and Prosper. A jury subsequently convicted Lawrence and Prosper on seven counts: one count of conspiracy to commit bank robbery, three substantive counts of bank robbery, and three counts of using or carrying a firearm during and in relation to a bank robbery.

The District Court denied post-trial motions for judgments of acquittal and for new trials. The Court sentenced Lawrence to 824 months in prison and ordered him to pay $304,087.50 in restitution. The Court sentenced Prosper to 794 months in prison and ordered him to pay $304,087.50 in restitution. Lawrence and Prosper filed their timely notices of appeal on February 28, 2008.

II. Alleged Trial Errors

Both Lawrence and Prosper argue that various errors were made by the District Court during trial. This section will address the errors alleged by each Appellant in turn.

A. Admissibility of Evidence: Lawrence

Lawrence challenges the District Court's admission of five separate pieces of evidence. Here, we review the first four challenges, properly preserved at trial, under an abuse of discretion standard. *Gov't of the Virgin Islands* v. *Albert*, 241 F.3d 344, 347 (3d Cir. 2001). The fifth evidentiary challenge, raised for the first time on appeal, is reviewed for plain error only.[2]

Lawrence contends that the District Court erred in admitting evidence (1) that he was shot in

[2] We review alleged errors without contemporaneous objection for plain error. *United States* v. *Lessner*, 498 F.3d 185, 192 (3d Cir. 2007). Plain error occurs when (1) an error is committed; (2) that error is plain; and (3) it affected the defendant's substantial rights. *Id.*

the head on October 3,2005, prior to the Woodbridge robbery; (2) of the .380 caliber semi-automatic handgun recovered from his residence on October 3,2005; (3) of the fact that he suffered five gunshot wounds to the torso on July 25, 2005, prior to the Holmdel robbery; and (4) of the .38 caliber handgun recovered from his residence in May of 2006. Lawrence asserts that all of this evidence "inflam[ed] the emotions of the jury and ... depict[ed] [him] as someone who had a general propensity for gun violence and criminality." (App. Lawrence Br. at 9) We disagree.

Per Rule 404(b) of the Federal Rules of Evidence, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Lawrence asserts that each of the four admitted pieces of evidence constitutes "other crimes" for purposes of Rule 404(b). This assertion is unpersuasive. We have held that "Rule 404(b) does not apply to evidence of uncharged offenses committed by a defendant when those acts are intrinsic to the proof of the charged offense." *United States* v. *Gibbs*, 190 F.3d 188, 217 (3d Cir. 1999). Notably, even in instances where the intrinsic act is extremely prejudicial to the defendant, "the court would have no discretion to exclude it because it is proof of the ultimate issue of the case." *Id.*

The evidence asserted here is intrinsic to the proof of the three bank robberies and thus admissible. First, the fact that Lawrence suffered a gunshot wound to the head on October 3, 2005, provided the jury with an explanation as to why he assumed a different role in the Woodbridge

robbery and corroborated Turner's testimony stating as much.

Second, investigators recovered a .380 caliber semi-automatic handgun from Lawrence's possession on October 3, 2005, which matched descriptions provided by eyewitnesses to the Holmdel robbery and also corroborated Turner's testimony.

Third, evidence that Lawrence suffered five gunshot wounds to the chest weeks prior to the Holmdel robbery on July 23, 2005, corroborated Turner's explanation as to why Lawrence dressed differently for the Holmdel robbery and enabled jurors to more easily identify Lawrence in video footage.

Fourth, Turner testified that Lawrence took possession of the gun used by Prosper in the commission of the Woodbridge robbery. The introduction of the .380 caliber handgun recovered from Lawrence's residence corroborated this testimony.

For these reasons, the intrinsic nature of the four pieces of aforementioned evidence justified their proper admission at trial. The District Court did not abuse its discretion in this regard.

Fifth, for the first time on appeal, Lawrence argues that the District Court erred in admitting testimony that police responded to his residence after receiving reports of gun fire. Prior to trial, the parties stipulated to a statement that police responded to Lawrence's residence "on a report of a gunshot being fired." Detective Killane's

testimony during trial was consistent with this stipulation and elicited no objection from Lawrence.

Lawrence now contends that the admission of this stipulated statement is extremely prejudicial, representing an effort by the Government to inflame the emotions of the jury and depict him as someone who has a general propensity for gun violence. We disagree. The police response to a report of shots fired initiated the discovery of the Woodbridge robbery money. Detective Killane's testimony carried substantial probative value in this instance as it provided the jury with an understanding of how the conspirators' robbery scheme began to come undone. The probative value of the stipulated statement outweighed any prejudice to Lawrence and was properly admitted by the District Court.

B. Admissibility of Evidence: Prosper

Prosper argues that the District Court improperly admitted irrelevant and prejudicial testimony that characterized each bank robbery as violent and heinous. He specifically points to (1) F.B.I. Agent Gallagher's testimony that "take-over robberies are the most serious type of bank robbery;" (2) Stacy Stone's testimony that she terminated her employment at Matawan Bank because "we were robbed and I didn't feel comfortable working there anymore;" and (3) Stone's further testimony that she was pregnant at the time of the Matawan robbery.

Prosper contends that the testimony of Gallagher had little probative value and was

intended to inflame the jury. Prosper objected to this testimony at trial and made no request for a mistrial. Thus we review the District Court's decision not to grant a mistrial *sua sponte* for plain error. *See United States v. Pungitore*, 910 F.2d 1084, 1126 n.58 (3d Cir. 1990); *Gov't of the Virgin Islands* v. *Charleswell*, 24 F.3d 571, 576-77 (3d Cir. 1994). The objection to this testimony was in fact sustained and that line of questioning halted. The jurors viewed video tape of all three robberies and, therefore, were able to come to their own conclusions as to whether the robberies were "serious" in nature. We cannot say that Prosper suffered prejudice significant enough from Gallagher's statement that the District Court erred in not declaring a mistrial *sua sponte*.

Proper also argues that the District Court should have declared a mistrial *sua sponte* following Stone's testimony. Prosper did not object to Stone's testimony at trial, therefore we review the District Court's decision for plain error. *See Charleswell, 24* F.3d at 576-77. Stone's testimony that she felt uncomfortable working in the bank following the robbery did not result in substantial prejudice to Prosper. Further, her testimony that she was pregnant at the time of the robbery was offered to corroborate Turner's testimony that Lawrence and Prosper described a pregnant woman as being in the bank at the time of the robbery. As such, the District Court did not plainly err in failing to declare a mistrial *sua sponte* as a result of this relevant testimony.

C. Request for Mistrial: Lawrence

In response to an inquiry by the Government regarding Lawrence's initial understanding of his *Miranda* rights prior to his December 9, 2005 arrest, Detective Killane testified to Lawrence's "past run-ins with law enforcement." (DAL at 81.) Upon Lawrence's objection to the statement, the testimony was stricken from the record and a curative instruction issued. Lawrence subsequently moved for a mistrial on the basis that Killane's statement and the prior admission of five pieces of disputed evidence constituted cumulative prosecutorial misconduct that effectively denied Lawrence a fair trial. The District Court denied the motion and noted that it was "satisfied that the potential prejudicial impact of the testimony ... while unfortunate, is simply unlikely to have any impact on the jury's verdict in this case." On appeal, Lawrence contends that the District Court erred in failing to grant a mistrial. We disagree.

In addition to Detective Killane's testimony, Lawrence points to the five pieces of disputed evidence discussed in Section II.A as grounds for a mistrial. As we have already found these pieces of evidence were properly admitted, our focus here rests solely on the District Court's decision to strike the disputed testimony and on the validity of the curative instruction in this regard.

We review denials of motions for mistrial for abuse of discretion. *United States* v. *Rivas*, 493 F.3d 131, 139 (3d Cir. 2007). Notably, "such discretion is construed especially broadly in the context of Rule 403." *United States* v. *Mathis*, 264 F.3d 321, 327 (3d Cir. 2001). Here, Lawrence

bears the burden of showing that the District Court's decision to strike the testimony was insufficient to cure any error that may have occurred. *United States* v. *Thorton*, 1 F.3d 149, 156 (3d Cir. 1993). It is generally presumed that a jury will follow a court's instruction to disregard inadmissible evidence. *See Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987).

In this case, it is unlikely that the jury proved unable to follow the District Court's instructions. The District Court provided a simple and coherent instruction to jurors immediately following Killane's utterance of the statement. Furthermore, we agree with the District Court that the statement's inherent lack of specificity in regard to certain past crimes rendered the statement only minimally prejudicial. Consequently, we are satisfied that the District Court did not abuse its discretion in declining to grant a mistrial.

D. Unexplained Wealth

For the first time on appeal, Prosper asserts that the District Court erred by failing to provide the jury with a limiting instruction upon the introduction of evidence concerning his sudden acquisition and expenditure of unexplained wealth following the Matawan robbery. As with the previous unpreserved objections on appeal here, we review this contention for plain error. *Lessner*, 498 F.3d at 192. We conclude that the

District Court did not err by failing to provide a limiting instruction regarding Prosper's unexplained wealth.

We have stated that "the sudden unexplained acquisition of wealth by an impecunious person at or about the time of a theft which he had the opportunity to commit, is competent evidence of guilt and will support ... conviction." *United States* v. *Chaney*, 446 F.2d 571, 575 (3d Cir. 1971). In this case, Prosper spent thousands of dollars in the days and weeks following the first bank robbery. Prosper's acquisition of wealth in the days following the first robbery appears great, especially given the fact that he reported annual income of $8,000 for tax purposes at this time.

Prosper's characterization of his post-Matawan robbery spending spree as evidence of "other crimes" for purposes of Rule 404(b) is erroneous. The Government offered evidence of Prosper's ability to make purchases in a way that was not possible for Prosper prior to the Matawan robbery, not evidence of a crime or crimes tending to show Prosper's bad character or propensity to commit a crime. There exists a great imbalance between the amount of money spent subsequent to the Matawan robbery and Prosper's reported annual income. This imbalance is certainly probative.

III. Alleged Sentencing Errors

Lawrence and Prosper challenge the reasonableness of the sentences imposed by the

District Court on several grounds. We review these sentences under an abuse of discretion standard.[3]

At the outset, Lawrence maintains that the District Court abused its discretion by (1) failing to depart from the statutory minimum; and (2) finding that Lawrence and Turner were not similarly situated offenders for purposes of 18 U.S.C. § 3553(a).[4] We disagree.

A district court does not have the authority to depart from statutorily mandated minimum sentences in the absence of (1) a government motion for reduction based upon a defendant's substantial assistance or (2) a defendant's compliance with the safety valve in § 3553(f). *United States* v. *Kellum*, 356 F.3d 285, 289 (3d Cir. 2004). Here, the Government did not move for a departure based on substantial assistance, and

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[3] We review a sentence by first ensuring that the sentencing court did not commit a serious procedural error. *United States* v. *Lopez-Reyes*, 589 F.3d 667, 670 (3d Cir. 2009). Upon reviewing the procedural validity of a sentence, we next "review the substantive reasonableness of the sentence under an abuse of discretion standard, while keeping in mind that as long as a sentence falls within the broad range of possible sentences that can be considered reasonable in light of the [18 U.S.C.] § 3553(a) factors, we must affirm." *Id.* (internal quotations omitted).

[4] Appellant Lawrence's brief argues that the District Court failed to "deviate" from the mandated minimum sentence. (App. Lawrence Br. at 33.) The use of the term "deviate" in relation to sentencing is inaccurate. Rather, we will review the District Court's decision not to "depart" or "vary" from the statutory minimum.

the nature of the Lawrence's § 924(c) conviction for possession of a firearm during and in relation to a robbery prohibits consideration of the safety valve factors. Therefore, the District Court did not abuse its discretion in refusing to depart from the statutorily mandated minimum sentence.

Contrary to Lawrence's second contention, we have held that the "disparity of sentence between co-defendants does not of itself show abuse of discretion." *United States* v. *Parker*, 462 F.3d 273, 276-77 (3d Cir. 2006). The District Court considered Lawrence's contention that he and Turner were similarly situated for purposes of § 3553(a) and rightfully rejected it. Significant differences between Lawrence and Turner justify the 728-month disparity in their sentences. Most obviously, Turner pleaded guilty to a single count of using or carrying a firearm during and in relation to a bank robbery in violation of 18 U.S.C. § 924(c), a charge which carries a seven-year mandatory minimum consecutive sentence. In contrast, Lawrence pleaded not guilty and was convicted of, among other things, three counts under § 924(c) which, in turn, carry a 57-year mandatory minimum consecutive sentence. Also, Turner pleaded guilty to the charges against him, faced fewer counts of conviction, and cooperated significantly with law enforcement. Given these circumstances, the District Court correctly concluded that Turner and Lawrence were not similarly situated co-defendants for purposes of § 3553(a) application.

Lawrence also contends that the conditions of his pre-trial confinement in Passaic County Jail

justified a downward variance in sentencing rather than an imposition of the minimum sentence under the Guidelines. He asserts that the District Court's failure to grant a downward variance constitutes an abuse of discretion. We disagree and are satisfied, like the District Court, that the conditions in the Passaic County Jail do not warrant an Eighth Amendment or substantive due process inquiry.

Prosper contends that the District Court abused its discretion by imposing a disproportionate sentence without consideration for his insubstantial criminal history and the fact that no injuries stemmed from the robberies. We disagree.

We have held that "although the proportionality principle [of the Eighth Amendment] applies to sentences of terms of years, only an extraordinary case will result in a constitutional violation." *United States* v. *Walker*, 473 F.3d 71, 79 (3d Cir. 2007). Contrary to Prosper's claim, no such extraordinary case of gross disproportionality exists here. *See id.* at 82-83. Prosper's sentence is not disproportionate from or unreasonable in the face of the gravity of the crimes. Prosper demonstrated a willingness to repeatedly engage in felonious behavior when he committed three consecutive armed robberies spread out over a period of several months. The District Court could reasonably conclude that the crimes Prosper committed were "momentous enough to warrant the deterrence and retribution of lengthy consecutive sentences." *Id.*

IV.

For the foregoing reasons, we will affirm the District Court's judgments.